

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**

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State of Oklahoma, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	<b>Case No. 05-CV-0329 GFK-SAJ</b>
	)	
Tyson Foods, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

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**THE CARGILL DEFENDANTS' REPLY IN SUPPORT OF  
MOTION FOR MODIFICATION OF SCHEDULING ORDER**

Defendants Cargill, Inc. and Cargill Turkey Production, LLC (“the Cargill Defendants”) submit this reply in support of their motion to extend and modify the dates in the Court’s Scheduling Order of March 9, 2007. In their response, Plaintiffs have agreed that a substantial extension of time is necessary and ask the Court to extend all dates evenly by eight months. (Dkt. No. 1322 at 1.) Although the Cargill Defendants welcome Plaintiffs’ softening of their original refusal to consent to *any* modification of the schedule, the Cargill Defendants continue to believe that sixteen months is a more appropriate extension given the amount of work that remains to be done in this case. In particular, the Cargill Defendants believe it critical that the Court adjust the timing of and substantially increase the amount of time between the parties’ deadlines for expert reports on causation, injury, and damages.

**A. The Cargill Defendants Have Worked Hard But Unsuccessfully To Reach a Scheduling Stipulation With Plaintiffs.**

The Cargill Defendants initiated several conferences with Plaintiffs in an attempt to present the Court with a stipulated motion to amend the pretrial schedule, both before and

after bringing the original motion, the last on October 26, 2007. Despite Plaintiffs' immediate need for extension – as their non-damages expert reports are due in five weeks while they now seek an eight-month extension – Plaintiffs would not agree to any proposals, and the conferences failed.

**B. Production Delays Have Hampered the Schedule.**

As the voluminous docket evidences, discovery in this case has not run smoothly. Although a point-by-point refutation of Plaintiffs' recitation is unnecessary given Plaintiffs' concession of the need for additional time, Plaintiffs are patently wrong in claiming that "the State has fully complied with its discovery obligations." (*Id.* at 4.) To the contrary, the Court has found that Plaintiffs have violated various discovery Rules, largely granting motions to compel brought by several Defendants. (*E.g.*, Dkt. Nos. 1061, 1118, 1150, 1336.) Indeed, Plaintiffs have conceded as much; in responding to a motion for sanctions for breaching the discovery Order of May 17, 2007, Plaintiffs' counsel had to "confess" that they had "overused" the Rule 33(d) option to designate documents when responding to the Cargill Defendants' interrogatories, certifying that several interrogatories were answered by documents but later asserting that no such documents existed. (Sept. 27, 2007 Hrg. Tr.: Dkt. No. 1317 at 39; *see also id.* at 52, 64.) Moreover, despite intervening motions to compel and for sanctions and related Orders, Plaintiffs did not offer this "confession" until more than ten months after their original responses. Plaintiffs cannot fairly call the Cargill Defendants' motion for sanctions "meritless." (*See* Dkt. No. 1322 at 8.)

By Plaintiffs' own admission, they do not expect to fulfill even their existing year-old discovery obligations to Defendants until December 2007. (*Id.* at 5.) Moreover, Plaintiffs' production chart is not accurate. For example, although Plaintiffs indicate that the

Department of Tourism and Recreation production is complete, the parties are actually still meeting and conferring on known deficiencies in that production. (See Ex. 1: Oct. 18 & 26, 2007 Emails of T. Hill & T. Hammons.) Although the chart states that the Department of Wildlife Conservation production will be completed by October 15 as ordered by the Court, the production is actually not finished. (See id.) Likewise, although Plaintiffs were ordered to complete their Department of Health ESI production by October 15 (Dkt. No. 1336 at 9), Plaintiffs will not confirm that production is complete until December 1 (see Ex. 1). Additionally, per the discovery Order of October 24, 2007, Plaintiffs must still supplement all ESI productions with “specific queries, information, and technical support that will allow Defendants to ascertain the ESI provided in response to the specific requests.” (Dkt. No. 1336 at 9.)

Importantly, the parties have engaged in lengthy conferences and disputes specifically regarding Plaintiffs’ production of the sampling data mandated by the discovery Order of January 5, 2007 (Dkt. No. 1016). The original Scheduling Order contemplated that Plaintiffs would produce their sampling data in February 2007 and that Defendants would retain and start working with their experts. However, until Plaintiffs complete their sampling program and provide all such data to Defendants, the Cargill Defendants cannot even retain all of their experts and cannot practically begin working with them to review that crucial data. Nor has the data that has been provided gone according to the Court’s original plan. Plaintiffs have not produced much of their sampling data in a timely manner, and Plaintiffs admit that they often take months to provide copies of this data to Defendants. (See Dkt. No. 1322 at 14.)

The problem is particularly egregious with respect to the Plaintiffs’ DNA analysis / microbial source tracking data, which (according to Plaintiffs) underlies the core of their

claims. Plaintiffs admit that they did not even begin producing DNA analysis or microbial source tracking data to Defendants until September 2007. (Id. at 7.) Moreover, the summary of DNA data thus far does not match the corresponding Standard Operating Procedures (“SOP”) that Plaintiffs have produced. (See Ex. 2: N. Wind Poultry Quantitative Summ.; Ex. 3: Manure Sampling DNA Analysis SOP.) The DNA SOP describes collections from seven sources of fecal matter – including dairy cattle, swine, geese, septic trucks, wastewater treatment plants – notably none of which involve chicken or turkey fecal matter. In contrast, the summary of data produced last month regards data collected from water, soil, and poultry litter samples from sampling conducted at grower locations by subpoena a year and a half ago. Not only does the SOP describe non-poultry fecal matter sources for sampling, but also it describes testing methods entirely different from those described in the analytical summary of data recently produced. Further, although the SOP is dated February 6, 2007, it was not produced until September 2007 in response to Defendants’ letter noting deficiencies with Plaintiffs’ Court-ordered scientific production. (See Ex. 4: Aug. 29, 2007 Letter & Sept. 19, 2007 Resp.) The SOP also shows the existence of an earlier version of the SOP dated April 26, 2006, a version that Defendants have never received. (See Ex. 3.)

Although Plaintiffs claim they could not begin producing data until completing their “new method” for using DNA source tracking, they have failed to produce any materials that may have been propagated from the samples collected (e.g., bacteria cultures, colonies, mixtures, etc.) that would allow Defendants to run their own analysis on these cultures. (See Ex. 5: Oct. 7, 2007 Letter of R. George.) Indeed, Plaintiffs have not even produced a complete set of data, but merely an analytical summary of the relevant data. (See Ex. 2.)

Defendants have also discovered—purely by chance—the absence from Plaintiffs’ productions other scientific data they have developed. For example, Defendants learned that Plaintiffs had withheld BIOSEP bead data from production only by going through field notebooks that happened to mention such missing data. (See Ex. 6: example Fieldbook entry at STOK0020402 – 22.) Although Plaintiffs began deploying the BIOSEP beads in March 2006, they were not produced until September of 2007 – almost a year and a half later. (See Ex. 7: Sept. 19, 2007 Supp. Prod. Letter.) Likewise, Plaintiffs have not produced the necessary sampling protocols for data until pressed by Defendants. For example, not until September 2007 did Plaintiffs produce the protocol for sediment data they collected in 2004. (See Ex. 4.)

In addition, the data that has been produced often lacks important quality assurance and control (“QA/QC”) and chain of custody information from the laboratories that analyzed the samples (see id.), an omission inconsistent with Plaintiffs’ representation that they withhold all data from their experts and Defendants alike until the QA/QC process is completed. Finally, Plaintiffs have produced much of the data in an unorganized, incomplete, and unreadable format (see id.; Ex. 8: benthic data sheet), a fact likewise inconsistent with Plaintiffs’ assertions that they provide the Defendants with the same data that their own experts review and analyze.

As described in the opening briefing, the amount of information at issue here is enormous in depth and scope. Because production has been much delayed and this case is extremely complicated, the pretrial schedule necessitates a greater extension than the eight months Plaintiffs propose.

**C. Defendants Need More than Two Months to Respond to the Heart of Plaintiffs’ Case – Their Expert Causation Evidence – and More than One Month to Respond to Plaintiffs’ Damages Evidence.**

Despite numerous discovery battles, Plaintiffs only recently admitted that they have no direct evidence of wrongdoing by the Cargill Defendants – or any Defendant – and instead intend to prove liability, causation, and injury through expert opinion. (E.g., Dkt. Nos. 1234 at 4-5; 1272 at 5, 8; see also Sept. 28 Hrg. Tr. Dkt. No. 1283 at 18, 20.) Plaintiffs’ expert opinions are, hence, their case, and Defendants cannot even begin to conduct much of their discovery and to prepare the bulk of their defenses until those opinions are finally revealed. Because of Plaintiffs’ reluctance to admit earlier the narrowness of their intended proof, the Court had no reason in its original scheduling order to focus in particular on the interval between the parties’ respective expert disclosures. The reality of Plaintiffs’ almost exclusive dependence on expert opinion for all the elements of their claims, however, fundamentally alters the sequence and proportions of discovery, and forces to the fore the importance of allowing Defendants sufficient time to digest and respond to Plaintiffs’ expert reports on causation, injury, and damages.

This is not a simple expert case, as where a plaintiff’s expert will say a product is defective and a defense expert will say it is not. The IRW at issue here contains more than a million acres, and no Defendant could realistically fully research and study the entire facility in preparation to defend against unknown scientific opinions and evidence. Defendants cannot know every location within the IRW that Plaintiffs have sampled and studied or anticipate what data Plaintiffs’ experts will rely upon. Indeed, Plaintiffs tout their innovative scientific method of DNA/microbial source tracking, claiming it is a “significant advance” in scientific application and potentially proprietary, and insinuating Plaintiffs may even have been able to patent it. (See Dkt. No. 1322-2 at 1-2.) Plaintiffs have spent more than four years and many millions of dollars working on this expert theory and collecting supporting

scientific evidence. (See Aug. 10, 2006 Hrg. Tr. at 176, 179: Dkt. No. 910-2.) However, they just began to provide such evidence to Defendants last month.

This case is not merely an easy roll-forward of evidence from the comparatively straightforward City of Tulsa litigation. The instant suit is exponentially more complex due to the sheer size and varied geography of the area at issue, the multi-faceted and convoluted nature of Plaintiffs' claims (CERCLA response, CERCLA NRD, RCRA, nuisance, etc.), and the reliance on unrevealed circumstantial evidence and previously untested data applications. As a result of these complexities, the lack of data from Plaintiffs, and Plaintiffs' disavowal of any reliance on direct evidence, Defendants have been forced to wait to see Plaintiffs' expert causation theories before they can adequately prepare a scientific defense.

The Cargill Defendants do not mean to suggest that Defendants have been sitting idly by; Defendants and their experts have prepared as much as possible. Nevertheless, once they review Plaintiffs' expert reports on liability, causation, and injury (along with any previously undisclosed data on which the reports are based), Defendants and their experts will need to:

- Evaluate Plaintiffs' opinions (in particular Plaintiffs' promised new way of applying DNA and microbial tracking methods) to determine whether Plaintiffs' experts are relying on valid scientific theories and processes;
- Take the depositions of ten or more Plaintiffs' experts, and possibly multiple lab personnel as well;
- Determine whether they need to perform their own sampling and evidence collection, either to rebut Plaintiffs' experts' opinions directly or to support alternative theories addressing the same issues;
- Perform any necessary testing or evidence gathering;
- Analyze the results of that testing and gathering; and
- Develop and reduce to writing Defendants' experts' opinions.

Plaintiffs have had years to perform these tasks. Proposing that Defendants can accomplish them in a mere two months is unfair and unreasonable, particularly given how close-mouthed Plaintiffs have been concerning this admittedly critical portion of their case. Indeed, any additional testing that Defendants' experts would need to conduct would—by itself—likely take up more than the two months contemplated by Plaintiffs' proposed revised schedule.

Likewise, the Cargill Defendants also request that the amount of time between competing expert damage reports be lengthened. Given the complexities of this case, a single month to prepare a rebuttal report is simply insufficient.

The Cargill Defendants ask that the Court provide Defendants with one year after Plaintiffs' expert disclosures on all issues but damages, and ten months after Plaintiffs' expert damages disclosures, to make Defendants' own responsive disclosures – periods that amount to roughly one quarter of the time that Plaintiffs have had to prepare their expert case. The Cargill Defendants would be happy to talk with the Court about flexibility in these proposed periods, so long as that period for causation and injury expert reports takes into account the seasonal requirements discussed below.

**D. Defendants Need a Spring Sampling Season.**

Plaintiffs suggest their expert report on injury and causation be due August 4, 2008, with Defendants' rebuttal reports due October 1, 2008. This proposed timing would allow Plaintiffs yet another spring sampling season (for a total of three since filing the case), while preventing Defendants from collecting samples during a single growing season when Defendants have knowledge of Plaintiffs' expert opinions to properly inform such sampling.

Plaintiffs' own statements show Defendants' need for a full spring season during which to conduct rebuttal expert sampling and research. In their February 2006 motion for

leave to conduct expedited sampling of water, soil, and litter from poultry growers (Dkt. No. 210), Plaintiffs represented that such sampling had to occur between March and June, as the spring-cleaning of poultry houses then “coincide[s] with the rainy season when runoff can be collected,” and following the spring rains “the levels of bacteria as well [as] other pollutants peak in the surface waters of the IRW.” (*Id.* at 2, 5.) Plaintiffs stated that “[s]ampling of runoff during this time period is essential to characterizing the source and nature of pollutants released from the Poultry Integrator Defendants’ operations,” and “the most comprehensive investigation should be conducted [in spring] in order to match the chemical constituents and bacteria with other sampling of water and sediments ...” (*Id.* at 5-6, emphasis added.) Plaintiffs averred that “evidence collected during the period of heavy land application and spring rains is necessary to confirm that [Plaintiffs’ claims] are attributable to the Poultry Integrator Defendants’ waste disposal practices.” (*Id.* at 5, emphasis added.)

The Cargill Defendants request only a single spring season to pass after Plaintiffs reveal their expert theories and opinions so that they too can sample during the “necessary” and “essential” spring time period. As Plaintiffs represented to the Court, the evidence collected during this period is necessary to confirm – or as a corollary, to refute – that Plaintiffs’ claimed injuries are attributable to the Cargill Defendants’ actions.

**E. Plaintiffs’ Proposed Change in Language Is Unjustified.**

Plaintiffs assert without explanation that the initial expert reports due – on injury and causation and all other issues except damages – should instead be called “non-relief-related reports,” while the expert reports on damages be correspondingly named “relief-related reports.” (Dkt. No. 1322 at 12, n.10 and Ex. 3.) The Scheduling Order employs standard, unambiguous language; Plaintiffs’ vague alternative language would only introduce

confusion and ambiguity. If Plaintiffs intend to suggest that the Court should alter the substance of the parties' disclosure obligations on these respective deadlines, they should say so and state what they believe those new obligations should be. Absent such a suggestion, however, the Court should reject the requested change in language.

**F. Conclusion.**

The Cargill Defendants propose a fair and workable modified pretrial schedule. The Cargill Defendants have diligently tried to meet the existing schedule, and do not casually seek extension and modification. As described above and as Plaintiffs agree, this highly complex case requires more overall time than allowed in the current schedule. Further, this Court should allow Defendants a full year to respond to Plaintiffs' expert liability and causation reports, rather than the less than eight weeks suggested by Plaintiffs, and should allow Defendants a critical spring season in which to prepare their reports. Finally, the Court should allow Defendants ten months rather than a single month to prepare rebuttal expert reports on damages. The Cargill Defendants thus respectfully request that the Court enter the pretrial schedule proposed at page 2 of Docket No. 1297.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that on the 29<sup>th</sup> day of October, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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